

Strengthening the Biological and Toxin Weapons Convention

A two-week session, the twenty-second, of the Ad Hoc Group to consider a legally binding instrument to strengthen the Biological and Toxin Weapons Convention (BWC) was held in Geneva from Monday 12 to Friday 23 February 2001. As in the previous session in November/December, negotiations took place in a number of forums. The Friends of the Chair (FOCs) continued to hold some formal meetings to develop the text for which they are responsible as well as informal meetings and consultations with delegations to explore possible solutions to remove square brackets. The Chairman also continued his series of bilateral informal consultations with representatives of states parties to address the outstanding key issues in order to explore conceptual approaches to find common ground. Over 50 informal consultations, ranging from 30 minutes to 3 hours in duration, were held during the two week session.

Overall, the February session saw a further continuation of the change that had begun in the July/August 2000 session to less work being carried out in formal sessions and more “give and take” discussion in informal consultations. This was illustrated by the fact that out of 20 possible meetings during the two week session, there were actually 11 formal meetings. On some days, there were no formal meetings. This again indicated that the previous more formal methods of work are close to having achieved as much as is possible in developing agreed text and in the removal of square brackets and there is a greater need now to explore new informal and formal ways of reaching solutions which will attract wide support.

In the February session, 54 states parties and 3 signatory states participated; 2 more states parties than in the November/December session as 6 states (Bolivia, Guatemala, Iraq, Panama, Singapore and Yemen) participated in February whilst 4 states (Cyprus, Jamaica, Thailand and Viet Nam) did not. The same 3 signatory states participated as in November/December.

There was no change to the Friends of the Chair. The list of the Facilitators to assist the Ad Hoc Group saw the addition of Mr Reza Pourmand Tehrani of Iran to the list of those assisting Ambassador Don Mahley as facilitator for the Headquarters Agreement with the Host Country: Ambassador Krzysztof Jakubowski of Poland, Mr Adrian White of Australia, Mr Malik Azhar Ellahi of Pakistan, Ms Katarina Ragnitt of Sweden and Ms Anayansi Rodriguez Camejo of Cuba.

There was again a decrease in the number of new Working Papers (WPs) — to 7 in February from 10 in November/December 2000. The WPs (WP.438 to WP.444) were presented by the following states: two papers by South Africa and by the United States; single papers by the Netherlands and by the United Kingdom; and a paper by Australia, Austria, Belgium, Canada, Germany, Italy, Korea, Sweden and the UK. These focused on a number of issues — 3 relating to investigations, 2 relating to measures

to improve the implementation of Article III of the Convention (non-transfer), 1 on confidentiality and 1 on the seat of the Organization.

The outcome of the February session was produced as a complete update of the Protocol issued as an Annex to the procedural report (BWC/AD HOC GROUP/55 — because of the number of pages, this has been issued in two pieces: 55-1 and 55-2). This was thus the fifteenth version of the rolling text — previous versions having been produced in June 1997 (#35), July 1997 (#36), October 1997 (#38), February 1998 (#39) and June/July 1998 (#41), September/October 1998 (#43), January 1999 (#44), April 1999 (#45), July 1999 (#46), October 1999 (#47), February 2000 (#50), April 2000 (#51), August 2000 (#52) and December 2000 (#54). Again, as in December 2000, there is no Part II containing papers prepared by the Friends of the Chair of proposals for modified text for further consideration. This reflected the general change in the overall negotiations which have moved towards a more informal exploration of possible solutions.

The February session had fewer formal meetings as Friends of the Chair used informal and formal meetings as they judged appropriate to carry forward their work. The FOC meetings focused on definitions and objective criteria (2 meetings), compliance measures (1 ⁵/₆ meetings), and declaration formats (1 ⁵/₆ meetings) with between ¹/₆ to ²/₃ meeting on the preamble, investigations, confidentiality issues, measures related to Article X, seat of the organization, decision on the establishment of a Preparatory Commission and the Headquarters Agreement with the Host Country. There were 1 ¹/₂ meetings devoted to AHG plenary meetings. As already noted, the Chairman held over 50 bilateral consultations during the two week session.

The AHG meeting as usual saw an associated event involving NGOs — on 16 February the Department of Peace Studies of the University of Bradford presented and distributed a further *Briefing Paper* in its series: No 33 *The BTWC Protocol: Improving the Implementation of Article III of the Convention: Pragmatic Considerations* (available at <http://www.brad.ac.uk/acad/sbtwc>).

Political Developments

As usual a number of statements were made during the February session. On the opening day, Ambassador Tibor Tóth, Chairman of the Ad Hoc Group, in his opening remarks recalled that in his remarks at the end of the previous session in November/December 2000 he had put the work of the Ad Hoc Group into context so that all participants could better understand what remains to be done. He had said then that the most difficult work needed to be done in 2001 and:

it was now time to move away from talking about compromises to actually delivering such compromises.

Ambassador Tóth went on to note that the indicative programme for the 22nd session provides each Friend of the Chair with a meeting or part of a meeting with remaining meetings — some 11 out of the 20 available — allocated to the Ad Hoc Group or to informal consultation. It was important that Friends of the Chair carry forward their work in their own respective areas of the rolling text and, where possible, deliver the necessary compromises. Ambassador Tóth, however, recognised that it was becoming more difficult for the Friends of the Chair to achieve progress as:

It is no longer possible to consider the rolling text of the Protocol in its discrete sections, because the remaining areas of difference are linked to progress in other areas of text.

Ambassador Tóth said that he had given much thought to the working methods of the Ad Hoc Group during the 8 weeks since the last session as the overall number of square brackets had reached numerical stagnation during the past three sessions. He therefore judged that negotiations based solely on the procedures used so far would not allow the Ad Hoc Group to fulfil its mandate in the timeframe allocated to the work. He recalled that he had carried out a series of informal consultations at the 20th and 21st sessions in which he had had approximately 100 bilateral meetings with delegations in each session. He intended to continue these informal consultations at the 22nd session.

Ambassador Tóth also said that in addition to the bilateral consultations, and as a direct result of them, delegations had received a series of written elements related to certain parts of the text. At the last session, written elements addressing conceptual solutions based on the rolling text had been circulated related to: Declarations; Follow-up after submission of declarations; Randomly-selected transparency visits; Declaration clarification procedures; Transfers; Entry into force; Cooperation; and issues related to the Organization. A further series of written elements had been made available on Friday 9 February dealing with Definitions; Lists; Measures to ensure submission of declarations; Legal elements; Assistance; National implementation; and Organization. He invited delegations to let him have their views on all these written elements during the informal bilateral consultations during the 22nd session.

He went on to note that there is much to be done in the nine weeks of AHG session available to complete the work: not only has the rolling text to be finalized and a Protocol agreed that is acceptable to all, the report of the Ad Hoc Group has to be drafted, issues relating to the Preparatory Commission for the future Organization addressed, and a Special Conference convened to adopt the report before November 2001. He concluded by saying:

Every single delegation ... here now has to move from its long-standing favoured options towards a middle ground that brings an acceptable compromise to all delegations. That will, I know, be painful. ... Let us not forget what the ultimate goal of our endeavours is: it is not about a new treaty, it is about strengthening existing obligations and preventing human beings from being subjected to the willful infliction of disease. Only with such a bulwark in place will technological progress deliver its benefits to all countries and help make the world a safer place.

In the subsequent plenary session, a number of statements were made. Peter Goosen of South Africa spoke to

introduce two Working Papers. He went on to recall the consensus that the negotiation should be concluded so that its product can be considered by a Special Conference before the Review Conference in November–December 2001. South Africa believed that the method of negotiation adopted previously has taken the Ad Hoc Group as far as it is possible to go and that the time is now ripe for the Ad Hoc Group to move to a new methodology that will create the necessary foundation to meet the mandate within the timeframe agreed at the last Review Conference. South Africa went on to say that the only way to generate the new momentum is for the Chairman to take the initiative to bring before the Ad Hoc Group his best estimate of the compromises that should be considered as a basis for concluding the negotiations. He went on to say that South Africa had studied the building blocks circulated at the previous session which are only snapshots of certain elements of the text and for the necessary compromises to be seen there is a need to see the full picture. Given that there are nine weeks of negotiation time in three sessions before the Review Conference, South Africa believed that the full picture would only be achieved by the distribution of a complete compromise or vision text. It was the view of South Africa that such a text would need to be distributed as soon as possible before the end of this session.

Italy then spoke saying that during the last session it had welcomed the circulation of the first proposals for key parts of the rolling text. Italy was confident that those first building blocks on the way to being refined may soon be followed by the Chairman's consolidated text from which to take the final leap towards the conclusion of the Protocol. Italy noted that the Protocol must be realistic but at the same time effective. International cooperation in the field of biotechnology must be seriously implemented and enhanced for the common benefit of all states parties through Article VII of the Protocol.

Russia said that they were ready to work to find compromises as they recognised the decision of the Fourth Review Conference to complete the Protocol by the Fifth Review Conference. Russia was ready to study the compromise materials distributed at the last session and more recently for this session.

New Zealand spoke to associate themselves with the South African view on the need to move forward as soon as possible on the basis of having a complete picture of the Chairman's assessment of an adequate compromise for the completion of the Protocol as they believed that this was critical to maintaining momentum towards completion of the Protocol.

Ambassador Hu Xiaodi of China then spoke noting that this was the first meeting in the new century and saying:

Strengthening the effectiveness of the Biological Weapons Convention in a comprehensive and practical manner and freeing humanity from the threat of biological warfare at an early date is an important task the times entrust to us.

He went on to say:

After years of intensive work, the framework of the Protocol has gradually come into shape....The negotiation, in our judgement, is now making steady progress. However, great efforts remain to be made in order to complete our negotiation in a timely manner.

He said that China remains committed to completing the negotiation within the envisaged timeline. He noted that the Ad Hoc Group's working methodology had changed with informal consultations taking place more frequently with more compromise proposals being put forward and said that this is the logical development of multilateral negotiation. He concluded by saying:

The conclusion of the Protocol will only be the result of compromises made by all sides, which to a great extent depend on their political willingness.

Norway spoke briefly to support the South African views regarding reservations and to associate Norway with the intervention made by New Zealand.

Pakistan then spoke to express concern about the South African working papers which proposed moving chunks of text from the Annexes to the Articles and urged that the Ad Hoc Group should avoid such drastic structural changes in the rolling text. Pakistan believed that it was not the time to look at "texts that are sent from heaven" but that negotiations are the name of the game.

Australia then spoke to reiterate that chunks of text did not provide the full picture and Australia looked forward to having the full picture as to how the Ad Hoc Group might finalise their work. As to when the Chairman should provide the full picture, Australia believed this was a decision for the Chairman as he was the best judge of when this should be. Australia went on to say that it did not expect to see in every slab of text exactly Australia's preferred positions as this was not the nature of negotiations. Finally, Australia agreed that the Ad Hoc Group process hitherto had begun to be a little stale and to have outlived its purpose. Consequently, Australia looked forward to working with the Chairman and other delegations in drawing upon any kind of negotiating style including the informals and bilaterals and group discussions as that was a way to make progress.

Iran spoke to reiterate its readiness and willingness to fully cooperate in a constructive manner in order to successfully complete the negotiations within the deadline that the Ad Hoc Group expected and wished to fulfil. Iran recalled that they were among those who welcomed the modified methodology of negotiation and the holding of more informal consultations by the Friends of the Chair and the Chairman. Iran appreciated the informal consultations by the Chairman and welcomed the chunks of paper which he had prepared as the result of the consultations. However, it felt that producing a text parallel to the existing text would not be helpful. It was however keen to continue the informal consultations and to work towards reaching agreement.

Libya then spoke to express its satisfaction at what has been achieved in previous sessions and looked forward to the day when there is a clean text that meets the approval of all states parties which they hoped would not be too far off. Libya then went on to emphasise the importance of Article X of the Convention and Article VII of the Protocol as well as of Article VI of the Protocol on the provision of protection for states parties.

Finally, the Netherlands spoke to reaffirm their support for the points made by South Africa on reservations and on the timing of the issuing of the Chairman's text as an integral text and to associate the Netherlands with the support expressed also by New Zealand and Norway.

Further statements were made later in the Ad Hoc Group session notably one on Monday 19 February by Ambassador Salander of Sweden speaking on behalf of the EU, the nine associated Central and Eastern European countries and the associated countries Cyprus, Malta and Turkey. In this he recalled that the EU had made a statement during the previous session in which the EU outlined how it envisaged the future Protocol and which provisions it considered as being the heart of the Protocol. These points were still valid and instead of repeating them, he would focus on the question of how the Ad Hoc Group will be able:

to reach the final compromises necessary to meet the deadline set by the Fourth Review Conference and agreed upon by all States Parties.

He went on to say that the EU agreed with the Chairman's analysis in his opening statement regarding the state of the negotiations and added that the EU:

cannot see how the working method used presently in the Ad Hoc Group can take us much closer to the final compromises necessary for the conclusion of the Protocol. States Parties are stating the same national positions as so many times before instead of seeking solutions to the critical issues at stake. This is not surprising, since the remaining difficult compromises cannot be done in isolation. For this, the full picture is required.

He then said that what was being expected from the Chairman was his assessment of where the compromises are to be found and that:

It is only by such an input, a chairman's text, that the negotiations will be brought to a successful conclusion. We are also convinced that the Ad Hoc Group needs this input as soon as possible given the limited period of time left to us. There will always be uncertainties, but you, Mr Chairman are the only person with the complete understanding of the state of the negotiations on which to base your judgement. The EU has confidence in you exercising this judgement at the appropriate time.

The Emerging Regime

As noted above, out of 20 possible meetings during the two week session, there were actually 11 formal meetings with some days having no formal meetings at all. There were, at most, two meetings by any Friend of the Chair and it was evident that additional meetings were not being sought by the Friends of the Chair. There is a real sense that although there was one bracket bazaar, the incremental removal of square brackets has virtually ceased.

Three working papers addressed investigations. One by South Africa (WP.440) proposed moving chunks of text from the Annex on Investigations into the Article on Investigations because of concern that material in the Annexes might be subject to reservations. Two were presented by the United States — one (WP.441) proposing amended language for the Article and the Annex on investigations and the other (WP.442) proposing what it described as "technical improvements" in respect of the provisions in the Annex on investigations for sampling and identification for field and facility investigations. These "technical improvements" appear to reflect the US concern about possible loss of information rather than to ensure an

effective Protocol regime in that, for example, the language already out of square brackets in the rolling text requiring samples to be “analysed in two designated and certified laboratories” is removed and elsewhere language is proposed that even in field investigations the receiving state party can specify which tests or analyses are used or to refuse a sample. The US appears in such proposals to be seeking to blunt the ultimate measure of the Protocol.

Two working papers addressed Article III, Section F which is concerned with measures to strengthen the implementation of Article III of the Convention — the non-transfer obligations — which is almost certainly the most significant remaining issue for the Protocol. WP.443 (Australia, Austria, Belgium, Canada, Germany, Italy, Korea, Sweden and the UK) said that the key requirement of this section of the Protocol should be:

to provide a common basis for all States Parties to strengthen the effective implementation of their non-proliferation obligations under the BWC.

The text should therefore contain provisions on:

- The establishment of export controls through appropriate legislative or regulatory measures to ensure that all exchanges of potential dual-use items will only be used for prophylactic, protective or other peaceful purposes;...
- National regulations governing the transfer of specified dual-use items ... Such provisions should include:
 - A requirement for end-use certificates...
 - A requirement for States Parties to assess the non-proliferation credentials of the potential recipient including its adherence to the BWC and Protocol as well as other relevant multilateral arms control treaties;
- Increased transparency of transfers of dual-use items to build confidence in the implementation of the non-proliferation obligations of States Parties, for example,
 - Annual retrospective and aggregated reporting of transfers of certain high-risk dual-use equipment...;
 - Provision for bilateral consultation to provide assurance that a completed transfer has been made in accordance with the non-proliferation obligations of the Convention;
 - Provisions for post-shipment verification by the transferring State Party to provide assurance that such transfers are in compliance with the Convention.
- Encouraging strictly bilateral consultations in the event of a suspected violation of Article III of the Convention through an unduly authorised transfer....
- Encouraging States Parties to take additional export control measures beyond those specified in the Protocol.

WP.444 (UK) proposed “for greater clarity and precision” changes to the items of equipment listed, currently within square brackets, in Section F of the rolling text.

The second working paper by South Africa (WP.439) on confidentiality provisions proposed moving chunks of text from the Annex on Confidentiality into the Article on Confidentiality Provisions because of concern that material in the Annexes might be subject to reservations. The Netherlands working paper (WP.438) provides further explanation on points raised by several delegations concerning the

Netherlands’ bid to host the future Organization: the points are conference facilities, subsidies, accommodation, visas and the position of dependent family members.

Written Elements

As noted by Ambassador Tóth in his opening remarks to the session, written elements addressing conceptual solutions based on the rolling text had been circulated at the November/December session related to: Declarations; Follow-up after submission of declarations; Randomly-selected transparency visits; Declaration clarification procedures; Transfers; Entry into force; Cooperation; and issues related to the Organization. A further series of written elements had been made available on Friday 9 February dealing with: Definitions; Lists; Measures to ensure submission of declarations; Legal elements; Assistance; National implementation; and Organization. These written elements contain what might best be described as a “stripped down” or shorthand text in which many words are shortened — so that, for example, investigation becomes *inv*, request becomes *req* and state becomes *S* — thereby usefully encouraging the reader to consider the proposed language *de novo* and the proposed conceptual approach on its own merits. Further fragments were issued during the February session and immediately after the session so that delegations have received written elements addressing conceptual solutions based on the rolling text for virtually the whole of the Protocol.

The procedural report for the February session includes a paragraph recording that throughout the two weeks of the session, the Chairman had conducted a series of bilateral consultations with representatives of states parties participating in the work of the Ad Hoc Group. These consultations had focused on the key remaining issues and were:

aimed at a conceptual exploration of possible future solutions in the following areas: General Provisions; Definitions; Lists and Criteria, Equipment and Thresholds; Declarations; Measures to Ensure Submission of Declarations; Consultation, Clarification and Cooperation; Investigations; Additional Provisions on Declarations, Visits and Investigations; Confidentiality Provisions; Measures to Redress a Situation and to Ensure Compliance; Assistance and Protection Against Bacteriological (Biological) and Toxin Weapons; Scientific and Technological Exchange for Peaceful Purposes and Technical Cooperation; Confidence-Building Measures; The Organization; National Implementation Measures; Legal Issues; Lists and Criteria (Agents and Toxins); List of Equipment; Annex on Investigations; Annex on Confidentiality Provisions.

Prospects

In the closing meeting of the session, Ambassador Tóth said that what was emerging was a prevailing constructive mood and he thanked delegations who are enabling the Ad Hoc Group to take forward the process in a constructive way. He noted that although there had been less visible signs of progress during the session there had, nevertheless, been useful progress in the informal consultations carried out by the Friends of the Chair, between delegations and in the

Chairman's informal bilaterals. The informal bilaterals had given the Chairman both a more nuanced understanding of how delegations are approaching the outstanding issues and their early reaction concerning the written elements or building blocks that had been shared with delegations. From this, Ambassador Tóth said, there is a recognition of a need for a more holistic approach to issues. His intention was to use "these pieces of Swiss cheese with all the big holes in them" to try to move forward in terms of being able to have some ideas on the table for a more integrated consideration of issues. It was clear that delegations were reading with interest what is in the building blocks whilst at the same time they are more interested in what is not in the building blocks. Another aspect was that although the range covered by the building blocks was not the same as that of the draft Protocol, he asked delegations to take those building blocks and give them very careful attention as part of the endeavour to explore certain compromise avenues whilst going in a direction that delegations can tolerate.

The challenge for the future was that there was a recognition of the need to consider ideas in a more holistic way using a more composite set of proposals whilst at the same time care needed to be taken not to endanger the precious capital that has been accumulated since the summer of 1997 when the first version of the rolling text was placed on the table. Clean text in the rolling text is extremely important and there are also useful ideas in the rolling text. Consequently, while trying to prepare a set of more composite proposals for future consideration this was a very important element. He emphasised that the need for a more composite set of proposals did not come from the need to flex innovative or intellectual muscles but the intention would be to inherit the clean text part of the rolling text and whatever elements close to consensus might be drawn upon as a result of the work of the Friends of the Chair. He went on to point out that it was necessary to consider any set of new ideas in a detailed way from the point of view of not only what has been given but also what has been gained. It was clear that delegations are ready to consider ideas in a more holistic way as those ideas will assist the Ad Hoc Group in a balanced way to move the process forward. He concluded by making it very clear that great care needed to be taken to avoid endangering the possibilities for concluding the work of the Ad Hoc Group by too hasty action or with action that does not generate the right level of support.

The programme of work for the twenty-third session to be held from 23 April to 11 May was agreed with the 30 meetings allocated entirely to the Ad Hoc Group, apart from informal consultations on the two days (25 & 26 April) when the Preparatory Committee for the Review Conference will be meeting and meetings on the Seat of the Organization, the decision on the establishment of a Preparatory Commission and on the host country agreement as follows:

| | |
|------------------------|-------------|
| Seat of Organization | 0.5 |
| Preparatory Commission | 1 |
| Host Country Agreement | 1 |
| Informal | 4 |
| <u>Ad Hoc Group</u> | <u>23.5</u> |
| Total | 30 |

The allocation of essentially all the meetings to the Ad Hoc Group confirms the indication that the Friends of the Chair have done as much as it is possible for them to do and that the April/May session will be addressing the complete picture.

The February session thus saw much informal consultation with relatively few formal meetings. Written elements addressing conceptual solutions based on the rolling text for virtually the whole Protocol were produced and circulated to delegations prior to, during and just after the session; these elements were in stripped down text which usefully encouraged delegations to consider them *de novo*. Several delegations encouraged the Chairman to present the whole picture as a composite text when the time was ripe. There is consequently a sense of anticipation that a composite text should be available for the April/May session.

There was a continuing commitment by all delegations in the February session to the completion of the negotiations by the Fifth Review Conference in November–December 2001. There is also a clear expectation that a complete picture should become available soon as it is widely recognized that such a complete picture is necessary to bring the negotiations to a successful conclusion. The appearance of further written elements prior to, during and after the February session again shows that the Ad Hoc Group is poised and ready to complete its work in 2001. It is evident that the Protocol negotiation can indeed be completed before the Fifth Review Conference.

This review was written by Graham S Pearson, HSP Advisory Board

The Continuing Trial of Wouter Basson

This report covers the period 10 October 2000 through 31 January 2001. A detailed account is posted on the HSP website.

The court moved to Florida during 10–23 October to hear the evidence of American attorney David Webster and that of his wife Jane Webster. It convened in US Middle District Court, Jacksonville, with Judge Willie Hartzenberg

presiding, under the rules and procedures of the South African legal system.

Basson was not present during these hearings, although all three members of his defence team — advocates Jaap